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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 219

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

TENNESSEE PRODUCTS & CHEMICAL CORPORATION and NATIONAL LABOR RELATIONS BOARD,
Respondents.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

BASHAM COAL COMPANY, CATES COAL COMPANY, MARSHALL MEEKS d/b/a CHERRY COAL COMPANY NO. 15, JAMES CAMPBELL COAL COMPANY, Formerly CLEAR CREEK COAL COMPANY, COAL CREEK COAL COMPANY, CARDELL COAL COMPANY, CUNNINGHAM BROTHERS COAL COMPANY, O. L. ELLIS COAL COMPANY, WILLIS FLYNN COAL COMPANY, HUBERT FULTZ COAL COMPANY, GOODSPRING COAL COMPANY, GRUNDY MINING COMPANY, HOWARD HIGGINS and/or AUSTIN MATTHEWS d/b/a HICKORY COAL COMPANY, HOWARD HIGGINS COAL COMPANY, C. P. HUNZICKER COAL COMPANY, FRANK HUNZICKER COAL COMPANY, ALTON JOHNSON COAL COMPANY, KELLY CREEK COAL COMPANY, ALTON JOHNSON d/b/a MAPLE COAL COMPANY, MARTIN COAL COMPANY, MARSHALL MEEKS COAL COMPANY, 9TH WEST COAL COMPANY, NORTH END COAL COMPANY, LEON NUNLEY COAL COMPANY, EARL PATTON d/b/a HUBERT FULTZ COAL COMPANY, J. R. PATTON COAL COMPANY, LEON PATTON COAL COMPANY, M. A. PAYNE, INC., H. WILLIS FLYNN d/b/a POPLAR COAL COMPANY, JOSEPH H. GRAHAM d/b/a PINE COAL COMPANY, R & S COAL COMPANY, J. W. SANDERS COAL COMPANY, STEPHENSON BROTHERS COAL COMPANY, INC., ALTON JOHNSON d/b/a SPRUCE COAL COMPANY, SYCAMORE COAL COMPANY, TENNESSEE CONSOLIDATED COAL COMPANY, TRACY CITY COAL COMPANY, VIRGIL THOMAS COAL COMPANY, TRUSSELL COAL COMPANY, WALNUT COAL COMPANY and NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF OF RESPONDENT TENNESSEE PRODUCTS AND CHEMICAL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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INDEX.

	Page
STATEMENT OF FACTS	3
THE REASONS FOR DENYING THE WRIT	9
I. The Sixth Circuit Did Not Err in Holding That Employers Could Unilaterally Withdraw From a Multi-Employer Unit, and Thereby Destroy the Existence of the Unit After the Start of Collective Bargaining on the Facts of This Case	9
II. The Sixth Circuit Did Not Exceed the Permissible Limits of Judicial Review When It Held That the Board Had Erred in Finding Appropriate a Multi-Employer Unit of Coal Companies Which Had Voluntarily Undertaken to Bargain on a Multi-Employer Basis With the UMW	10
CONCLUSION	11
APPENDIX A—Motion for Reconsideration and/or Reopening of the Record	A1
APPENDIX B—Order Denying Motion for Reconsideration and/or Reopening of the Record	A11

STATUTE CITED.

	Page
National Labor Relations Act, Section 8(a)(5) and (1), as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 et seq.	2, 6, 8



IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1650.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

TENNESSEE PRODUCTS & CHEMICAL CORPORATION and NATIONAL LABOR RELATIONS BOARD,

Respondents.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

ASHAM COAL COMPANY, CATES COAL COMPANY, MARSHALL MEEKS, D/B/A HERRY COAL COMPANY NO. 15, JAMES CAMPBELL COAL COMPANY, FORMERLY LEAR CREEK COAL COMPANY, COAL CREEK COAL COMPANY, CARDELL COAL OMPANY, CUNNINGHAM BROTHERS COAL COMPANY, O. L. ELLIS COAL COMANY, WILLIS FLYNN COAL COMPANY, HUBERT FULTZ COAL COMPANY, GOODRING COAL COMPANY, GRUNDY MINING COMPANY, HOWARD HIGGINS AND/OR USTIN MATTHEWS D/B/A HICKORY COAL COMPANY, HOWARD HIGGINS COAL OMPANY, C. P. HUNZICKER COAL COMPANY, FRANK HUNZICKER COAL OMPANY, ALTON JOHNSON COAL COMPANY, KELLY CREEK COAL COMPANY, LTON JOHNSON D/B/A MAPLE COAL COMPANY, MARTIN COAL COMPANY, ARSHALL MEEKS COAL COMPANY, 9TH WEST COAL COMPANY, NORTH END OAL COMPANY, LEON NUNLEY COAL COMPANY, EARL PATTON D/B/A HUBERT ULTZ COAL COMPANY, J. R. PATTON COAL COMPANY, LEON PATTON COAL OMPANY, M. A. PAYNE, INC., H. WILLIS FLYNN D/B/A POPLAR COAL COMANY, JOSEPH H. GRAHAM D/B/A PINE COAL COMPANY, R & S COAL COMPANY, W. SANDERS COAL COMPANY, STEPHENSON BROTHERS COAL COMPANY, INC., LTON JOHNSON D/B/A SPRUCE COAL COMPANY, SYCAMORE COAL COMPANY, ENNESSEE CONSOLIDATED COAL COMPANY, TRACY CITY COAL COMPANY, VIRGIL HOMAS COAL COMPANY, TRUSSELL COAL COMPANY, WALNUT COAL COMPANY AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF RESPONDENT TENNESSEE PRODUCTS AND CHEMICAL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Tennessee Products & Chemical Corporation (Tennessee Products), prays the Court to deny the petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) entered March 5, 1970, in *Tennessee Products & Chemical Corporation v. National Labor Relations Board*, No. 18,357 and *National Labor Relations Board v. Basham Coal Co., et al.*, No. 18,463. Therein, the Sixth Circuit denied enforcement to a bargain order of the Board that would have required Tennessee Products & Chemical Corporation and other respondents to bargain with the United Mine Workers of America (UMW), as part of a multi-employer bargaining unit. Said order of the Board had held that Tennessee Products refusal to bargain with the UMW constituted a violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended. (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 et seq.)

STATEMENT OF FACTS.

The following facts are supplementary to those set forth in the Petition. Such facts relate only to Tennessee Products & Chemical Corporation and are material to the issues framed in *Tennessee Products & Chemical Corporation v. National Labor Relations Board*, No. 18,357 below.[1]

Tennessee Products terminated its coal mining operations in January of 1962, and it terminated all of its coal mine employees at that time (J. A. 88a; Tr. page 88, line 7), except that it continued to employ three "tipple employees" in connection with the continued purchase and sale of coal. In March, 1963 (Tr. page 88, line 7), Tennessee Products discontinued these three employees from its payroll and abandoned the purchase and sale of coal. The strike that began in the southeastern Tennessee coal field on December 26, 1962, was the proximate factor in the initial decision to discontinue operations (J. A. 46a-47a).

In June, 1963, the Board held hearings in the underlying representation cases (J. A. 1a). Based upon facts developed in those hearings, the Board, on September 20, 1963, issued a Decision and Direction of Election (J. A. 14a et seq.) wherein it made finding concerning the nature of Tennessee Products' operations and interest in the coal field as they existed *prior to June 1963*. (Emphasis added.)

On October 3, 1963, prior to the election, Tennessee Products wrote to the Board, through its attorney, and advised the Board that it had determined that it would not again re-engage in coal mining activities, and that it con-

1. Citations to the record shall conform to the practice used by the parties in the Sixth Circuit; namely: "J. A." references are to portions of the record printed in a Joint Appendix. References to the transcript of testimony in the unfair labor practice proceeding are designated "Tr." and references to the exhibits in such proceeding are designated as follows: General Counsel's Exhibits—"GCX"; Tennessee Products Exhibits—"PX"; Sewanee's Exhibits—"SX".

sidered the "tipple employees to be permanently separated as of the time they left the active payroll" (RPRX No. 4). The election was conducted on October 10, 1963 (J. A. 1a).

Between October, 1963, and June 1964, there were various procedural steps instituted by the Union involved and various other employers that resulted in hearings being opened before a Trial Examiner of the Board on June 16, 1964 (J. A. 1a-2a). On September 29, 1964, the Trial Examiner issued a Report (J. A. 32a) that dealt in part with changing conditions in the coal field that had occurred subsequent to the hearing held in June, 1963.

As to Tennessee Products, the Trial Examiner found that it had subleased all of its coal mining property in the area involved to another firm, and that on April 10, 1964, it had cancelled its agreement with twenty-five operators who had formerly operated coal mines on its leasehold. Moreover, it had advised such operators to the effect that if they desired to continue to mine and sell coal, they should contact the new sublessee (J. A. 38a-39a).

There is no evidence in the Record before this Court to establish that any time subsequent to the Report of September 29, 1964, that Tennessee Products re-engaged in the mining, purchase or sale of coal, or that it hired or rehired any employees.

Ultimately, in June, 1965, the Board issued its certification that gives rise to this case (J. A. 2a). The certification was followed by the UMW's demand for bargaining of June and July, 1965; the unfair labor practice charge against Tennessee Products of March, 1966; and, the Complaint of April 8, 1966.

At the time the certification issued, Tennessee Products had not operated a coal mine for a period in excess of three years. At the time the certification issued, Tennessee Products had not operated its tipple or had any tipple employees on its payroll for a period in excess of two years.

At the time it was first charged with unfair labor practices, Tennessee Products had not mined coal for over four years, and had not had any active employees for over three years.

In his Complaint (GCX No. 1f, paras. 6, 7 and 14), the General Counsel expressly alleged that Tennessee Products was engaged in the purchase and sale of coal. Tennessee Products specifically denied such allegation in its Answer (GCX No. 1n). Tennessee Products had previously filed a Motion for a Bill of Particulars (GCX No. 1k) specifically seeking to ascertain the General Counsel's position concerning its non-operational status and its lack of employees. The General Counsel opposed such Motion (GCX 1-l), and it was denied (GCX No. 1j). Subsequently, in his Response to a Motion to Dismiss (GCX No. 1mm), the General Counsel stated that the issue as to *whether Tennessee Products was or was not operating or whether or not it had employees at the time of the certification was immaterial to his theory of the case.* (Emphasis added.) This position was repeated at the unfair labor practice hearing below (Tr. page 87, line 12).

In the context of the foregoing facts, neither the General Counsel nor the UMW offered or made any attempt to offer any evidence to support the allegations that Tennessee Products was engaged in the business of purchasing or selling coal. Moreover, no evidence was produced by either the General Counsel or the UMW to establish that Tennessee Products had, at the time of the certification or the unfair labor practice charge, any employees subject to the certification. The only record evidence bearing on these points is the uncontradicted testimony of a corporate officer, who is a member of the Bar, to the effect that Tennessee Products was not operating and had no employees covered by the certification at any time material to this matter (Tr. page 87, et seq.).

The General Counsel made no effort to sustain the burden of proof with reference to the allegations of his Complaint as to Tennessee Products' operational status, nor did he establish that Tennessee Products, at times material to this matter, employed any persons or employees covered by the certification.

Despite this fact, the Trial Examiner found, and the Board sustained such finding, that at all times subsequent to July, 1965, Tennessee Products had engaged and was engaged in unfair labor practices in violation of Section 8(a)(5) of the Act by refusing to meet and bargain with the UMW as part of the multi-employer bargaining unit that had been certified by the Board (J. A. 60a-61a, 99a-100a). Tennessee Products, in a further effort to separate itself from this litigation due to its non-operational status, thereupon filed a Motion for Reconsideration and, in the alternative, a Motion for Reopening of the Record (A1-A10; J. A. 133(a) et seq.). Tennessee Products was attempting to secure a further opportunity to demonstrate to the Board that it had in fact, no employees at the time the certification was issued. Such motions were denied by the Board in an Order issued October 9, 1967 (A11-A13; J. A. 142(a) et seq.).

Thereafter, Tennessee Products petitioned for review of the Board's Order in Case No. 18,357 below. In the Court of Appeals, the Board and the UMW shifted from their previously held position as to Tennessee Products continuing obligation to bargain under the Order in litigation. Both the General Counsel and the UMW admitted before the Court that Tennessee Products had, in fact, no obligation to bargain if it did not resume operations.

The Board in its brief stated:

> "The Board is not ordering Products to resume operations and, contrary to Products' contention (Brief p. 23), it is not ordering Products to bargain with the

UMW if it chooses not to resume operations. The Board has specified that any employer who 'continues completely inoperative and outside the unit . . . may avoid the obligation imposed' by its bargaining order (J. A. 95a)."

"After the Board's decision and order issued, Products sought to reopen the record to litigate further its non-operational status (J. A. 133a-142a). Because Products did not present anything material in support of such motion which had not been considered previously, the Board's refusal to grant the motion did not deprive Products of due process of law (J. A. 143-144a)."

Similarly, the UMW in its brief took the position:

"Apparently the Respondents construe the Decision and Order to mean that inoperative companies must recognize and bargain with UMW. This is an erroneous construction and it indicates that the Respondents have either overlooked the language quoted above or have injected this issue as a red herring. The Board did not rule, and certainly does not contend, that a Respondent who is completely inoperative must resume operations and bargain in order to avoid the obligation of the Order or a subsequent citation for contempt. The explicit language in the Decision and Order is to the contrary: A Respondent who "continues completely inoperative and outside the unit . . . may avoid the obligation imposed by the Order . . ." (J. A. 95a)."

The majority opinion did not reach the point argued by Tennessee Products since it denied enforcement of the Board's Order on other grounds. The dissent, however,

adopted the reasoning of the Board and the UMW, as advanced in their brief in the following terms:

> "THE EFFECT OF 'GOING OUT OF BUSINESS'"
>
> "Tennessee Products and other of the former operators contend that they are not in the business of mining coal, have not been in that business for years, and never intend to go back into that business. The Board order applies, however, only to those who do go back into business. The order specifies that any employer "who continues completely inoperative and outside the unit . . . may avoid the obligation imposed." Obviously, as long as some operators do not go back into operation, the Board order would be completely ineffective as to them, but it could also do no damage.
>
> In view of the nature of the Board's order, the motion to reopen proofs to show Tennessee Products' non-operational status was properly denied."

It would appear the dissenting Judge would have enforced the Board's Order finding the Tennessee Products had committed a violation of Section 8(a)(5) of the Act by virtue of its failure to bargain with the UMW, but, on the other hand, would hold such Order to be "completely ineffective" as to Tennessee Products since it had no employees in the classifications covered by the certification. Left unexplained in the position of the dissenting Judge, the Board, and the UMW is the question as to why Tennessee Products, with no employees in 1965, had violated the Act because of its failure to meet and bargain with UMW at such time.

THE REASONS FOR DENYING THE WRIT.

I.

The Sixth Circuit Did Not Err in Holding That Employers Could Unilaterally Withdraw From a Multi-Employer Unit, and Thereby Destroy the Existence of the Unit After the Start of Collective Bargaining on the Facts of This Case.

Tennessee Products here seeks denial of the petition for Writ of Certiorari only as it relates to Tennessee Products individually.

Tennessee Products had no employees covered by the certification in 1965 and has had none at any time since. Further, Tennessee Products has no intention of ever again employing any such classes of employees; it is in the process of corporate liquidation; and, it will shortly be surrendering its leaseholds over the coal lands involved in this litigation. However, it would appear that the logic of the Sixth Circuit, in denying enforcement of the Board's Order due to "unusual circumstances" cannot be attacked based upon the facts on the record before this Court.

In its creation of the multi-employer unit, the Board relied exclusively on facts *as they existed* (emphasis added) in the period prior to 1964. Thereafter, in seeking to enforce the obligation to bargain growing out of its certification, the Board gave no consideration to any of the changes that had taken place in the coal field subsequent to that time. The record here demonstrates that the majority of the employers and firms who had engaged in the formation of the multi-employer unit were no longer even in existence at the time the Board issued its certification. In attempting to enforce its certification in an unfair labor practice proceeding commenced in 1966, the Board made

no effort to ascertain or discover exactly what persons or firms were actually in existence in order to establish those persons who had some alleged duty to bargain pursuant to the certification. In effect, the Board's position throughout has been that it would first indict and convict all persons with some previous connection to the multi-employer unit and, then, after the fact, separate out those who had some obligation from those who had no obligation. Orderly collective bargaining on a multi-employer basis would, of course, have been impossible under such conditions. In any case, in view of the lengths of time between the initial recognition of the UMW by the group, the initial futile negotiations, the commencement of the strike, and the eventual issuance of the Board's certification, the Sixth Circuit is more than justified in refusing to abide by the normal rule of law in the "unusual circumstances" of this case.

The Sixth Circuit has not issued a precedent which weakens multi-employer bargaining or that has a significant bearing on national policy. Its decision is not in direct conflict with decisions of other circuits and the Board. Instead, the Circuit has merely refused to blindly apply an otherwise sound general principle to special facts "in unusual circumstances", which would have resulted in a distortion and perversion of such sound principle.

II.

The Sixth Circuit Did Not Exceed the Permissible Limits of Judicial Review When It Held That the Board Had Erred in Finding Appropriate a Multi-Employer Unit of Coal Companies Which Had Voluntarily Undertaken to Bargain on a Multi-Employer Basis With the UMW.

The petition for a representative election which gave rise to this matter was filed early in 1963. The certification that followed therefrom was issued in June, 1965. The

Board, in creating the multi-employer unit, totally ignored the facts and events that occurred in the interval and mechanically applied its rule as to withdrawal from and destruction of multi-employer bargaining units to the facts of this case. The Sixth Circuit properly denied enforcement of the Board's Order in light of the existence of a factual situation that is totally unique in experience and the history of the enforcement of the Act.

In so doing, the Court below has not exceeded the permissible limits of judicial review by refusing to become a party to the enforcement of an Order that would not have effectuated or fostered the basic purposes and policies of the Act.

CONCLUSION.

The considerations favoring the grant of a writ of certiorari are not here present. There is no essential conflict between the decision of the Sixth Circuit and other circuits or the Board. These cases turn upon their own special facts and no important question of Federal law or policy is here involved. Due to the unusual circumstances present, for the reasons assigned, the Respondent, Tennessee Products, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 10-CA-6350.
SEWANEE COAL OPERATORS ASSOCIATION, ET AL.

AND

UNITED MINE WORKERS OF AMERICA AND DISTRICT #19, UNITED MINE WORKERS OF AMERICA

CASE NO. 10-CA-6172.
SYCAMORE COAL COMPANY, INC.

AND

UNITED MINE WORKERS OF AMERICA

AND

SOUTHERN LABOR UNION, LOCAL NO. 139,
Party to the Contract.

espondent Tennessee Products & Chemical Corporation's Motion for Reconsideration and or Reopening of the Record.

Comes now Respondent Tennessee Products & Chemical orporation, hereinafter referred to as Respondent Prod-

nets, with this Motion for reconsideration and/or reopening of the record in the instant matter.

In support of such Motion Respondent Products submits the following reasons and arguments.

I. EXPLANATION OF REFERENCES:

The facts material and relevant to the instant proceeding span the period between 1962 and 1967. There are a number of published Board decisions and reports that cast light on the instant matter. In order to make meaningful references to such decisions and reports, and to the record and evidence in the instant matter, the following designations will be employed in this Motion:

1. Tr.—Transcript of testimony in the instant case.
2. GCX—General Counsel's exhibits in the instant case.
3. RPX—Respondent Products' exhibits in the instant case.
4. RPRX—Pespondent Products' rejected exhibits in the instant case.
5. TXD—The Trial Examiner's Decision in the instant case.
6. 1963 D D—The Board's Original Decision and Direction of Election dated September 20, 1963.
7. Boyls' Report—Trial Examiner Boyls' Report on Challenged Ballots and Events affecting Composition of Unit dated September 29, 1964.

II. RESPONDENT PRODUCTS' NON-OPERATIONAL STATUS:

A fundamental and material error in the Board's Decision and order (167 NLRB No. 12) stems from its failure

to reverse the Trial Examiner and find that Respondent Products had no obligation to bargain because it had withdrawn from active participation in the mining, purchasing and selling of coal and had no employees either active or inactive in the alleged bargaining unit.

Respondent Products terminated its coal mining operations in January of 1962, and it terminated all of its coal mine employees at that time (Tr., page 87, line 20, et seq.; 1963 D+D, page 2, line 22; Boyls' Report, page 4, line 14; RPX No. 2). There was no dispute about such fact; such evidence is uncontradicted on the record, and it was not challenged by either the Union or the General Counsel in the hearing in this case.

Until March of 1963, the Company continued to buy and sell, and had either two or three "tipple employees" engaged in such activity. It is uncontradicted in the record that such employees were terminated in March, 1963 (Tr., page 88, line 7), and that at no time after March, 1963, has the Company engaged in the coal business (Tr., page 88, line 11). The issue as to whether or not these persons still have any continuing relationship with the Company was *not* litigated at the hearing. Although, General Counsel had alleged in his Complaint (GCX No. 1f) that Respondent Products was still engaged in the business of purchasing and selling coal, and Respondent Products in its Answer (GCX No. 1n) had specifically denied such allegation, the General Counsel made no attempt to prove his allegation at the hearing.

Moreover, General Counsel and the Union made no effort to controvert or challenge the uncontradicted testimony of the Company's witness to the effect that the three individuals under discussion were deemed by the Company to have been terminated in March of 1963 (Tr., page 88, line 7).

It must be recalled that under General Counsel's theory of the case, as stated at the hearing (Tr., page 87, line 12), and in his response to Motion to Dismiss (GCX No. 1mm), the issue as to whether a respondent was or was not operating or had employees was immaterial to his theory of the violation.

Notwithstanding the fact that nothing in the General Counsel's evidence puts into issue Respondent Products' position that it had no employees of any sort or description at the time the certification was issued, the Trial Examiner has made a finding that these alleged employees were still on "layoff" in June of 1965 (TXD, page 15, line 42 et seq.).

Respondent Products in its Exception No. 19 sought reversal of this error on the part of the Trial Examiner.

There is no evidence in this proceeding or in any other proceedings to the effect that these persons were filling jobs within the bargaining unit covered by the certification. As far back as October, 1963, Respondent Products had advised the Board that such persons were not in classifications covered by the certification (RPRX No. 4). In addition, there is no evidence in the record of this case, or of any prior case concerning the duties of the individuals involved. It is to be recalled that the Union called a strike on December 26, 1962 closing down all the mines involved in these proceedings (Boyls' Report, page 2, line 42). The fact that the three individuals under discussion continue to work until March of 1963 adds weight to the Company's argument that they were in positions not represented by the Union. The fact that this present position that these employees were not part of the bargaining unit is not an afterthought on the part of Respondent Products is best demonstrated by reference to the Company's letter of October 3, 1963 (RPRX No. 4, page 2).

In October, 1963, the Company wrote to the Board stating that these individuals had been "permanently separated" (RPRX No. 4). In Boyls' Report, page 9, line 24, it is clear that the Examiner there was aware of the termination of such persons because they are clearly referred to in the past tense. At least by the time the hearings were held in June, 1964, there was no question as to termination.

No matter what the facts may have been in 1963 and in 1964, such facts cannot be relied upon or be held determinative as to what were the "facts" in June of 1965, when the Union made its bargaining request. The situation at *that time* is controlling here.

At that time, and at all times since, the Company had no operational employees of any type or nature engaged in the coal business. The Company had not mined coal for over three years or bought or sold coal for over two years.

A corporate officer of Respondent Products (Tr., page 87, line 3), a member of the Bar, with access to the book and records (Tr., page 87, line 9) testified that the Company regarded such persons as having been terminated in 1963 (Tr., page 88, line 9). This uncontradicted testimony, which was not even subjected to cross-examination by either the General Counsel, the Union or the Trial Examiner, is sought to be avoided because the witness, when later questioned concerning various lease arrangements and details of leases, truthfully stated that he did not have full knowledge as those aspects of the Company's operations. The witness' lack of knowledge as to one facet of the operation does not demonstrate that he was not fully qualified to testify as to other facts with which he was familiar. Particularly in a situation wherein none of the parties took issue with or challenged such testimony.

Respondent Products has been deprived of due process of law by virtue of the Board sustaining the Trial Examiner in these findings. The General Counsel and the Union did not litigate this issue. On the face of the pleadings and General Counsel's announced theory of the case, Respondent Products has been taken by surprise by a finding that it still has employees.

In its Motion for Bill of Particulars (GCS No. 1k), Respondent Products specifically sought to ascertain General Counsel's position as to the existence or non-existence of employees (See Paragraphs 8, 9, 10, 11 and 12). General Counsel opposed such Motion (GCX No. 1). A Trial Examiner denied such Motion (GCX No. 1jj).

Under these circumstances, Respondent Products requires, at a minimum, a further opportunity on the record to nullify the erroneous findings by the Examiner.

Respondent Products is confident that the Board, after it has considered the uncontradicted evidence; General Counsel's theory of the case and his lack of interest in litigating this aspect of the case; and, the length of time that transpired between the time these people left the Company's employ and the date of the certification issued, and will, on these grounds, reverse the Trial Examiner in this regard.

The actual practical fact is that at the time the certification was issued and at all times since, Respondent Products had no employees even remotely connected with the bargaining unit. Moreover, there exists no plans or programs whereby the Company intends to resume mining or purchase and sale operations in the future. Those being the facts, and the uncontradicted facts, Respondent Products is unable and has been unable to understand just what is expected of it.

Objective consideration of the record here demonstrates that Respondent Products withdrew from the

status of an "employer" long before the issuance of the certification, long before the filing of these Charges and long before the issuance of the instant Complaint. Moreover, the record contains no evidence to demonstrate that there was anything unlawful, illegal or improper in such actions.

A Company without employees, in the absence of some unlawful reason to account for the absence of such employees, has no obligation to bargain with a Union. In the absence of any obligation to bargain, there can be no unfair labor practice. If there can be no unfair labor practice, there can be no lawful Board order to remedy such non-existent unfair labor practices.

In summary as to this point, there is clear and uncontradicted evidence in the record to establish that Respondent Products' has no employees covered by the disputed certification. Moreover, General Counsel made it clear throughout his case that he was not challenging or litigating Respondent Products non-operating status. In the alternative the Board should either dismiss the Complaint as to Respondent Products or reopen the record to permit Respondent Products to fully litigate this issue.

III. FACTS OCCURRING SUBSEQUENT TO THE HEARINGS HEREIN:

Certain facts and transactions have occurred subsequent to the closing of the record herein which impel the conclusion that the record should be reopened in order that the Board properly evaluate Resopndent Products obligations and duties with reference to the certification involved in this litigation.

The Trial Examiner issued his Decision on March 28, 1967. Thereafter, under date of April 17, 1967, Respondent Products received a letter from the Mine Work-

ers requesting a meeting for the purpose of negotiating a contract. Respondent Products responded to such letter and stated that it would meet with the Union. On May 9, 1967, representatives of Respondent Products met with representatives of the Mine Workers in Nashville, Tennessee.

At such meeting Respondent Products again disclosed that (1) Respondent Products had no employees within the bargaining unit; (2) Respondent Products, except as a landlord, had no interest in or connection with any other persons or firms engaged in mining or selling coal; (3) Respondent Products had no intention of resuming active participation in the coal industry; (4) Respondent Products did not intend to renew its lease with the Tennessee Coal and Iron Company at the end of its current term; and (5) Respondent Products lack of interest in and/or control over the activities and affairs of any of the other persons or firms that are respondents in this case.

Notwithstanding these facts, it was the position of the Union representatives that the Mine Workers expected Respondent Products to either enter into a contract that would cover the employees of other persons or firms who are sub-lessees of Respondent Products or somehow cause such other persons or firms to themselves enter into agreements with the Union. Respondent Products rejected such proposals on both legal and practical grounds and the meeting ended on that note.

Evidence concerning such meeting should be before the Board in connection with this case. The fact that such a meeting took place and the results of such a meeting sustains Respondent Products' position with regard to the fact that it is not and was not properly a party to this case.

Respondent Products has no employees of its own, and will not and cannot become a party to any agreement covering employees over which it exerts no control. Further,

it lacks legal right or authority to bind any other firms or employers to a labor contract, and it would undoubtedly open itself to serious financial liability if it attempted to exercise any such right.

There are additional events which have taken place since the close of the record herein which Respondent Products desires to place before the Board. Under date of July 11, 1967, the Board of Directors of Respondent Products adopted a Resolution calling for the complete liquidation and dissolution of the Corporation. Under the terms of the plan for liquidation and dissolution, which was approved by a special meeting of the stockholders on August 21, 1967, the Company expects to cease active conduct of its business as promptly as is practicable and in any event by 1970.

In light of Respondent Products' unique status in relationship to this case, it is unfair and unjust to continue Respondent Products as a respondent to protracted litigation which is and has been moot insofar as Respondent Products is concerned. The fact that Respondent Products is now on public record as being in a position of going out of business entirely supports its many prior assertions in this case that it does not intend to resume operations in the coal industry.

As a practical matter, it is highly probable that Respondent Products will have ceased to exist before there is ever any bargaining pursuant to the certification.

IV. SUMMARY:

Respondent Products has been attempting to separate itself from this litigation since its beginning. Respondent Products was not named as a respondent until it received an amended Charge on April 1, 1966. At that point in time it had not engaged in coal mining operations for fifty-two months, and it had not purchased or sold coal for thirty-

seven months. In an effort to bring its non-operating status to the attention of the Board, it filed a Petition seeking either a Unit Clarification or an Amendment of Certification. Such Petition, still not acted upon, is before the Board in this case (RPX No. 15; Tr., page 108, line 22, et seq.). Respondent Products respectfully moves that the Board either reconsider its Decision and Order with regards to Respondent Products or reopen the record herein so that Respondent Products non-operating status can be fully litigated. In the present posture of this case, Respondent Products has been and is being deprived of due process of law.

Respectfully submitted,

/s/ GEORGE A. BURNSTEIN,
George A. Burnstein,
KLEINBARD, BELL & BRECKER,
1908 Fidelity Building,
Philadelphia, Pennsylvania,
Attorneys for Respondent,
Tennessee Products & Chemical Corporation.

September 7, 1967.

APPENDIX B.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 10-CA-6350.
SEWANEE COAL OPERATORS ASSOCIATION ET AL.,[1]

AND

UNITED MINE WORKERS OF AMERICA AND DISTRICT #19, UNITED MINE WORKERS OF AMERICA.

CASE NO. 10-CA-6172.
SYCAMORE COAL COMPANY, INC.

AND

UNITED MINE WORKERS OF AMERICA

AND

SOUTHERN LABOR UNION, LOCAL NO. 139,
Party to the Contract.

Order Denying Motions.

On August 22, 1967, the National Labor Relations Board issued a Decision and Order[2] in the above-entitled

1. As listed in footnote 1 of Board's Decision and Order.
2. 167 NLRB No. 12.

proceeding, adopting, with certain modifications, the findings and conclusions of the Trial Examiner, and as its Order, the Recommended Order of the Trial Examiner as contained in his Decision of March 28, 1967. The Trial Examiner had found that certain of the Respondents have violated the National Labor Relations Act, and recommended that they take certain specific action to remedy such unfair labor practices.

Thereafter, on September 11, 1967, Respondents Grundy Mining Company and Tennessee Consolidated Coal Company filed a joint motion that the Board reconsider its decision and order, and reopen the record in the proceeding, alleging that the language used in the decision "is so vague and indefinite that it lends itself to several interpretations." On the same day, Respondent Tennessee Products & Chemical Corporation, herein called Respondent Products, also filed a motion that the Board "either reconsider its Decision and Order with regards to Respondent Products or reopen the record herein so that Respondent Products non-operating status can be fully litigated." On September 18, 1967, Southern Labor Union, Local Union No. 139, filed a motion that the Board reopen the record and reconsider the extent to which the United Mine Workers of America engaged in competition with Respondents. On September 25, 1967, the United Mine Workers of America filed opposition to the motion filed by Southern Labor Union, Local Union No. 139.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the motions filed by Grundy Mining Company and Tennessee Consolidated Coal Company, by Tennessee Products & Chemical Corporation, and by Southern Labor Union, Local Union No. 139, be, and they

hereby are, denied on the ground that they contain nothing not previously considered by the Board.

Dated, Washington, D. C., October 9, 1697.

By direction of the Board:

GEORGE A. LEET,
Associate Executive Secretary.